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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN BURNS,

Defendant and Appellant.

B286615

(Los Angeles County  
Super. Ct. No. LA084811)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory A. Dohi, Judge. Affirmed and remanded with directions.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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As charged by the Los Angeles County District Attorney's Office, a jury convicted defendant and appellant John Burns with human trafficking of a minor, Carmen L. (Carmen), for a commercial sex act (Pen. Code, § 236.1, subd. (c)(1); count 1),<sup>1</sup> pimping of Haylie R. (Haylie) and Jonequa I. (Jonequa) (§ 266h, subd. (a); counts 3 & 5), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 7), human trafficking to commit pimping of Kamyn R. (Kamyn) (§ 236.1, subd. (b); count 8), and dissuading Haylie and Carmen from testifying (§ 136.1, subd. (a)(1); counts 10 & 11).<sup>2</sup> In a bifurcated proceeding, defendant admitted that he had five prior serious felony/strike convictions (§§ 667, subds. (a)(1) & (d), 1170.12, subd. (b)), and that he had served three prior prison terms (§ 667.5, subd. (b)).

Defendant was sentenced to a term of 172 years to life in state prison. As is relevant to this appeal, on counts 1 and 8, the trial court imposed the upper term (12 years and 20 years, respectively) as the base terms. Defendant's sentence also includes two enhancement terms of five years each, under section 667, subdivision (a)(1).

Defendant timely appealed. He argues: (1) There was insufficient evidence that he caused, induced, or persuaded, or attempted to cause, induce or persuade Carmen to work for him

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The jury hung on count 9 for assault with a firearm against Kamyn, and that count was later dismissed. Codefendant Korry Lyn Williams (Williams) was charged in count 2 with human trafficking of Carmen, and in counts 4 and 6 with pimping of Haylie and Jonequa. Williams settled his case before trial.

as a prostitute; (2) The trial court prejudicially erred when it failed to instruct the jury as to the lesser included offense of contributing to the delinquency of a minor in count 1; (3) The trial court prejudicially erred when it failed to instruct as to the lesser included offense of supervision of a prostitute in count 3; (4) Because there is no indication that the trial court exercised its discretion in selecting the base term when it sentenced defendant in counts 1 and 8, the matter should be remanded; and (5) The matter should be remanded for the trial court to exercise its discretion to strike the prior conviction enhancements imposed under section 667, subdivision (a)(1).

We agree with defendant that the matter must be remanded for resentencing. As to counts 1 and 8, there is no indication that the trial court exercised its discretion before using the maximum term as the base term in these two counts. Moreover, as the parties agree, the matter must be remanded to allow the trial court to exercise its newly-authorized discretion to strike the enhancements imposed pursuant to section 667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) (Sen. Bill 1393).) In all other respects, we affirm the judgment.

## **FACTUAL BACKGROUND**

### *I. Prosecution's Case*

#### *A. Defendant becomes Kamyn's pimp*

In June 2016, Kamyn met defendant, also known as "August." After working as a prostitute for herself for several months, she received a call from him on the number on her backpage.com advertisement. Backpage.com is an Internet site on which people can post advertisements for prostitution. Defendant told Kamyn that he could help her financially and with protection. On the front of his neck, defendant had a tattoo

of a lion with a crown. Lions and crowns are common tattoos for pimps.

Kamyn worked for defendant as a prostitute in San Bernardino, Hollywood, Pomona, and other areas. She had the words “August nina” tattooed on her cheek. According to Los Angeles Police Department (LAPD) Detective Tanya Edquist, who worked in the LAPD’s human trafficking unit, such a tattoo “[t]ells everyone who [the prostitute] belongs to.”

Kamyn gave all the money she made to defendant. With the money, defendant paid for hotels, food, clothes, a phone, and a car. Their goal was to make \$1,000 or more per day. Defendant would get “really mad” if they did not do so.

Defendant also regularly had sex with Kamyn. At one point, Kamyn thought that defendant was the father of her baby, but in fact he was not.

Defendant hit Kamyn a lot of times. He also put a gun to her face and threatened to kill her. As Kamyn begged defendant not to kill her, he fired the gun near her head.<sup>3</sup> On another occasion, after Kamyn asked defendant to take her home, defendant drove Kamyn to a house and had three girls “jump” her. A video of the beating, which had been posted on defendant’s Facebook account, was played for the jury. There were also photographs of Kamyn, Carmen, and Haylie on defendant’s Facebook account.

B. The police find Carmen

On November 7, 2016, LAPD Officer Amir Abolfazlian, who worked on a human trafficking task force, received information

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<sup>3</sup> This was the subject of count 9, as to which the jury hung.

about a missing minor, Carmen, who might be engaged in prostitution. Carmen was 17 years old. She looked very young.

Officer Abolfazlian checked Backpage.com and found an advertisement with Carmen's photographs on it. He arranged a "date" with her at the Studio 6 motel in Van Nuys. Carmen charged \$140 for a half hour of sex. Officer Abolfazlian went to Carmen's room number and she opened the door. She was returned to her home.

C. Defendant aids and abets the pimping of Jonequa

Jonequa was a prostitute whose pimp was Williams. Defendant was Williams's friend. Jonequa met defendant once before November 17, 2016. She and Williams were at a hotel in Hemet, and defendant arrived and talked to Williams. Williams told defendant to look at his "new girl," referring to Jonequa.

On November 17, 2016, Jonequa and Williams went to the Studio 6 motel and waited for defendant. When defendant arrived, he gave Williams a key to room 227. Jonequa stayed in the motel room as she had been told. Williams had posted Backpage.com advertisements for Jonequa on November 17 and 18, 2016, but she did not get any customers on those dates.

D. Defendant's arrest at the motel with Carmen and Haylie

On November 18, 2016, LAPD Officer Javier Heras and his partner, LAPD Officer Herrera, went to the Studio 6 motel in response to a 9-1-1 call. Dispatch indicated that defendant was the suspect, Carmen was the victim, and their motel room was registered under the name "Haylie." As the officers approached room 223, they saw defendant and Williams walking away from the room. Officer Heras ordered them to stop and put their hands up. Defendant complied. Williams entered room 227 and

closed the door. An officer detained defendant. Other officers entered room 227 and detained Williams and Jonequa.

Officer Heras knocked on the door of room 223. Carmen opened the door and Haylie was behind her. Haylie had large tattoos of the words “August nina” on her forearms.

The following items were recovered from room 223: a California ID in Haylie’s name, condoms, a Taser, and three cell phones. One phone belonged to Carmen. It contained photographs sent from defendant’s phone that were used in her Backpage.com ads. Carmen’s phone also contained text messages with potential customers.

Another phone, which had Haylie’s pictures in it, contained text messages to defendant about giving him money.<sup>4</sup> In response to the question, “How much money you got?,” the following message was read into the record: “I had 100. It [*sic*] got 50, dollar sign, card, to last and got you 50, dollar sign, change, plus I got two dates. OTW [presumably, out the way].” The \$50 referred to an Amazon card, which Haylie used as payment for her Backpage.com ads. Another message was read into the record: “Want me to bring you your dollar signs, money, and smoke a blunt?”

During a search of defendant, LAPD Officer Thomas Gracey recovered a car key fob. The fob activated an Audi that was parked at the motel. The following items were recovered from the car: a loaded handgun, which was on the floorboard

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<sup>4</sup> During her police interview, Haylie indicated that this phone also belonged to Carmen. The third phone belonged to Haylie.

between the driver's seat and center console<sup>5</sup>, approximately \$277 in cash in the car door, and a receipt for a phone with the same phone number as Carmen's phone.

E. Haylie's police interview

Also on November 18, 2016, Detective Edquist conducted a tape-recorded interview of Haylie. The recording was played for the jury. She initially referred to Williams as her pimp. She later asked, "What exactly is it that I have to do to get out?" Detective Edquist responded, "Well we have to tell the truth, right?" Haylie replied, "Okay, well then let's start over." She then admitted that "August [defendant] is my pimp."

Haylie also stated that defendant was "more so like my boyfriend, 'cause I don't pay him." However, when asked how long she had "worked for [defendant] or worked with him," Haylie replied that she had worked "for him" for about a month. When asked what she did with the money, she stated, "Buy everything I wanted. I don't have to give it to him. He don't make me, he don't ask me or nothing." She also said, "I never give him money except for like birthday. [¶] . . . [¶] I buy him gifts." <sup>6</sup>

Haylie found out "today" that Carmen was 17 years old. Carmen had said that she was 19 years old. Two or three weeks earlier (sometime around October 28 to November 4), defendant brought Carmen to Haylie's motel room. Haylie did not know

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<sup>5</sup> It was stipulated that defendant had a prior felony conviction.

<sup>6</sup> According to Detective Edquist, pimps sometimes receive things of monetary value from prostitutes, such as motel rooms, cars, jewelry, and clothing. "But most of the time, it's cash."

that Carmen was “working” at first. She thought Carmen was there just to hang out. When Detective Edquist noted, “But [Carmen] ends up working pretty much right away,” Haylie replied, “She has to.” According to Haylie, Carmen already knew what she was doing. Haylie normally had no more than one “date” a night. She believed that Carmen had “maybe like two or three . . . . At the most she’s had three.”

After Carmen was released from jail to her mother (on or about November 7, 2016), defendant picked Haylie up from her own mother’s house in San Bernardino, and Carmen was in his car.

#### F. Defendant’s jail calls

Recordings of defendant’s telephone calls from jail were played for the jury. During a call on November 25, 2016, defendant asked an unidentified male, “So, on my prelim, like, if, if, don’t none of the witnesses come, or nobody comes they got to throw it out, right?” The male responded, “Uh, nah, if they ain’t got no witnesses, they ain’t got no case.”

During a call with Haylie on the same date, defendant told her, “[Y]ou need to stay, stay on that and make sure that [unintelligible] don’t come nowhere near where I need to be.” Haylie said that Carmen was “trying to come to me,” and asked “You want me to leave her there, or no?” Defendant replied, “Hell no. Get ya’ll gerb. [i.e., hustle or game] on.” Haylie added, “She was just asking if basically, I had a place for her to trap [i.e., engage in prostitution] at.” Defendant asked, “For herself, or for me?” Haylie answered, “For her.” Defendant responded, “Nah, that’s out.”

During calls with Haylie on November 30, 2016, defendant stated, “You think because I’m in jail, you can get away with



murder, nigga?” He ordered her, “Get your mother\*\*\*ing ass up here [¶] . . . [¶] and put some money on my books.”<sup>7</sup> He then said, “I’ve been counting, so I can tell you how much to put on my books.” Haylie replied, “Okay. What do you mean you could tell me how much to put on your books? I know what I’m putting.”<sup>8</sup> He then warned Haylie, “I’m gonna get the f\*\*\* out of jail . . . . I’ll be out in a week, ho! . . . You better act right nigga.” “[Y]ou better remember who you talking to . . . . Yeah, bitch, you better look at your arms and remember, bitch.”

During a call on December 16, 2016, defendant told an unidentified person, “I’m only worried about two charges. . . . [O]nly one can stick though. It’s the gun charge, because that was in my car . . . . Everything in the car belongs to me, so they can get me with that.”

During a call with Haylie on January 3, 2017, defendant stated, “[T]hey got two days. I come back on Thursday. If they ain’t got the witnesses, they gotta dismiss the charges.” Haylie then asked, “So what do I do?” Defendant replied, “Same program, nigga. Two days, nigga. You gotta make sure . . . man.” He told Haylie, “I ain’t worried about you, I’m worried about . . . you know?” “Make sure the bitch ducked off. All the way off.”

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<sup>7</sup> Kamyn testified that when a pimp goes to jail, “you’re supposed to hold it down and keep working for them, putting money on their books or taking care of the situation.”

<sup>8</sup> Detective Edquist did not know for sure whether Haylie actually put money on defendant’s books. He received “paperwork” for only a portion of defendant’s stay in jail, and Haylie was not listed thereon.

During a call with Haylie and Carmen on January 5, 2017, defendant told Carmen, “You just keep your ass out the way, my nigga.” Carmen said, “Alright.”

During a call on March 5, 2017, defendant explained to an unidentified male how to pimp. He said, “[T]his is what you do. I’m telling you bro I ain’t gonna lead you wrong. Throw that phone out the window fool.” The male asked, “Without even telling her? Like just let me see the phone.” Defendant replied, “Man get the, let me see your phone—right out, and keep it pushing, turn your music up. Stay down.” He added, “[I]t’s a lot of iPhones . . . on that road because of me.”

Defendant next instructed the male to “go to the phone store and get her another one.” “[T]hen she gonna be like look man that life is over.” Defendant said, “[Y]ou don’t need none of them contacts.” “That’s over. You just need tricks and me [unintelligible] sister, me and the tricks.” He continued: “We know where mama live, we can go stop by there after . . . we get some dough . . . . [W]e might pay the rent. So she wouldn’t say nothing.”

Law enforcement attempted, without success, to obtain Haylie’s and Carmen’s presence in court.

## II. *Defense case*

Leah F. is Kamyn’s “aunt/cousin.” Kamyn lived with her in October and November 2016. After Kamyn moved in, she introduced Leah F. to defendant. (Kamyn, who was then pregnant, said that defendant was her boyfriend and her child’s father. Defendant came over several times and picked Kamyn up. Kamyn did not appear to be afraid of him. However, Kamyn later explained to Leah F. “what was happening.”

Robert Royce (Royce) is a private investigator with expertise regarding human trafficking. He opined that there are three ways in which people get into prostitution. “Number one, it’s a pimp influence; number two, it’s kidnapping and being forced into it; and number three, it’s environment and lifestyle issues.” The “vast majority” who choose prostitution for employment are influenced by “environment and lifestyles.” Royce did not interview the victims in this case.

### **DISCUSSION**

#### *I. Ample evidence supports defendant’s conviction in count 1 for human trafficking of Carmen*

Defendant argues that his conviction in count 1 must be reversed because there was no evidence that he caused, induced, or persuaded Carmen to work as a prostitute, or that he attempted to do so. He contends that Carmen may already have been working as a prostitute when they met and that it is speculation whether her activities were caused or induced by him.

As the parties agree, in considering an insufficiency of the evidence claim, we review the entire record in the light most favorable to the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “Substantial evidence” is evidence that is “reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Defendant was convicted in count 1 of human trafficking of a minor (Carmen) for a commercial sex act, in violation of section 236.1, subdivision (c)(1). That statute provides, in relevant part, “A person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of

commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of Section . . . 266h [pimping] . . . is guilty of human trafficking.” (§ 236.1, subd. (c)(1).) In determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the trier of fact considers the totality of the circumstances. (§ 236.1, subd. (d).)

As set forth above, the totality of the evidence here supports defendant’s conviction. Defendant was a pimp. He had tattoos that were common for pimps. Sometime around October 28, to November 4, defendant brought Carmen to Haylie’s motel room. According to Haylie, Carmen “ha[d] to” start working right away. Haylie believed that Carmen had two or three “date[s]” a night.

On or around November 7, 2016, the police found Carmen engaging in prostitution at the Studio 6 motel and returned her to her home. Sometime between November 7 and 18, the date of defendant’s arrest, defendant picked Haylie up and Carmen was in his car.

At the time of his arrest, defendant was at the Studio 6 motel with Carmen and Haylie. Carmen’s cell phone contained photographs sent from defendant’s cell phone that were used in her Backpage.com ads. In defendant’s car, the police recovered a receipt for a phone with the same phone number as Carmen’s phone. During a jail call, defendant explained how he would discard a prostitute’s cell phone and buy her another one in order to eliminate her prior contacts.

During another jail call, Haylie told defendant that Carmen was “trying to come to me,” and asked “You want me to leave her there, or no?” Defendant replied, “Hell no. Get ya’ll gerb [i.e., hustle or game] on.” Haylie added, “She was just asking if

basically, I had a place for her trap [i.e., engage in prostitution] at.” Defendant asked, “For herself, or for me?” Haylie answered, “For her.” Defendant said, “Nah, that’s out.”

This evidence shows that defendant not only facilitated Carmen’s work as a prostitute, but demanded that she work for him.

In urging reversal, defendant asserts that “[t]he evidence seems to indicate [that Carmen] may already have been working when she and [defendant] became associated.” Even if that is true, it is of no legal consequence. Section 236.1, subdivision (c)(1), punishes a person who causes, induces, or persuades a minor to engage in a commercial sex act, or attempts to do so, with the intent to be the victim’s pimp. The statute contains no requirement that a defendant be the original cause of the victim’s prostitution. In fact, in the context of the pandering statute (§ 266i, subd. (a)(2)), our California Supreme Court broadly held that “the proscribed activity of encouraging someone ‘to become a prostitute’ . . . includes encouragement of someone who is already an active prostitute.” (*People v. Zambia* (2011) 51 Cal.4th 965, 981.)

Defendant further argues that “[a]ny conclusion [that Carmen’s] activities were caused or induced by [defendant], rather than being the product of her own initiative, would be mere speculation.” We disagree. As summarized above, the appellate record contains ample evidence that defendant caused, induced, or persuaded Carmen to engage in prostitution. It follows that there is ample evidence to support defendant’s conviction in count 1 for human trafficking of Carmen.

II. *The trial court had no duty to instruct as to count 1 on the lesser included offense of contributing to the delinquency of a minor*

Defendant argues that the trial court erred by failing to instruct the jury sua sponte on the lesser misdemeanor offense of contributing to the delinquency of a minor (§ 272).

A trial court has a sua sponte duty to instruct on a lesser included offense if there is substantial evidence that the defendant is guilty only of the lesser offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. The rule's purpose is to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence. (*People v. Shockley* (2013) 58 Cal.4th 400, 403–404.) “[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.’ [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 668.)

According to defendant, contributing to the delinquency of a minor (§ 272) is a lesser included offense of human trafficking of a minor for a sex act (§ 272). In support, he directs us to Welfare and Institutions Code section 300, subdivision (b)(1). We are not convinced.

Under Welfare and Institutions Code section 300, subdivision (b)(1), a child is subject to the jurisdiction of the juvenile court if the child “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as

a result of the failure or inability of . . . her parent to guardian to adequately supervise or protect the child.” Subdivision (b) further provides, “The Legislature finds and declares that a child who is sexually trafficked, as described in Section 236.1 of the Penal Code, . . . and whose parent or guardian failed to, or was unable to, protect the child, is within the description of this subdivision.” (Welf. & Inst. Code, § 300, subd. (b)(2).) But section 236.1, the human trafficking statute, does not include an element that a parent or guardian has failed to protect the child. Nor does the accusatory pleading here allege such facts. Thus, defendant has not shown that human trafficking can be committed without also committing the lesser included offense of contributing to the delinquency of a minor; the latter is not necessarily included in the former.

Moreover, there was no evidence that the offense was less than the one charged. (*People v. Wyatt* (2012) 55 Cal.4th 694, 702–703 [obligation to instruct on lesser included offense does not rise when there is “no evidence” the offense was less than that charged].) We reject defendant’s claim that at most he “encourage[d]” Carmen to work as a prostitute, and “encouragement does not rise to the level of actions that cause, induce or persuade.” As set forth above, defendant did more than “encourage” Carmen to work as a prostitute for him. He arranged for a place for her to work; he provided her with transportation; he assisted her with her Backpage.com ads; he provided her with a new phone; and, perhaps most importantly, he demanded that she work for him.

Even if the trial court had erred by failing to give the instruction on a lesser included offense (which it did not), defendant cannot establish prejudice. (*People v. Watson* (1956)

46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) It is not reasonably probable that the alleged error affected the outcome. (*People v. Breverman, supra*, at p. 165.) As set forth above, there is ample evidence that defendant caused, induced, or persuaded Carmen to work for him as a prostitute.

III. *The trial court had no duty to instruct as to count 3 on the lesser included offense of supervision of a prostitute*

As to count 3, pimping of Haylie, defendant contends that the trial court erred in denying his request to instruct on the lesser misdemeanor offense of supervision of a prostitute (§ 653.23). The trial court denied defendant's request on the grounds that supervision of a prostitute is a "related offense but not a lesser-included offense." The trial court was correct.

Section 266h provides, in relevant part: "[A]ny person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution . . . is guilty of pimping." Section 653.23, subdivision (a), provides, in relevant part: "It is unlawful for any person to do either of the following: [¶] (1) Direct, supervise, recruit, or otherwise aid another person in the commission of a violation of subdivision (b) of Section 647 [prostitution] . . . [¶] (2) Collect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person in violation of subdivision (b) of Section 647."

The plain language of these statutes shows that it is possible for one to derive support or maintenance from the earnings of a prostitute, thereby violating the pimping statute, without directing, supervising, or otherwise aiding the prostitute, or without collecting or receiving such earnings.



In urging reversal, defendant argues that Haylie's statement to the police that she did not pay defendant shows that she and defendant had a boyfriend/girlfriend relationship, that she was engaging in prostitution because she wanted to, that she used the money she earned to buy things for herself, and that defendant participated only by directing or aiding her, such as by giving her advice or driving her around, thereby supporting his request that the trial court should have instructed the jury with section 653.23, subdivision (a)(1). We disagree. Detective Edquist explained that pimps sometimes receive things of monetary value from prostitutes in lieu of cash, such as motel rooms, cars, jewelry, and clothing. When defendant was arrested, Carmen and Haylie were in a motel room that was registered under the name "Haylie." And Haylie did admit that she bought defendant gifts.

Regardless, it is not reasonably probable that defendant would have obtained a more favorable outcome had the jury been instructed on the misdemeanor as requested. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) There was ample evidence that defendant derived support or maintenance from Haylie's prostitution. She admitted that defendant was her pimp, and that she had been working "for him" for about a month. She had large tattoos of the words "August nina" on her forearms, telling "everyone who [she] belong[ed] to." Indeed, during a jail call, defendant told Haylie to "remember who [she was] talking to," reminding her to "look at [her] arms and remember."

Moreover, the recovered cell phone, which had Haylie's pictures in it, contained text messages to defendant about giving him money. And, during a jail call, defendant ordered Haylie to

“[g]et [her] mother\*\*\*ing ass up [there]” and “put some money on [his] books.” As Kamyn explained, when a pimp goes to jail, a prostitute is supposed to keep working for him and put money on his books.

The totality of this evidence demonstrates that defendant derived support or maintenance from Haylie’s prostitution and was guilty of pimping as charged. There was no instructional error or prejudice.

#### IV. *Request for remand for resentencing*

Relying on *People v. Keelen* (1998) 62 Cal.App.4th 813 (*Keelen*), defendant argues that his case must be remanded for resentencing because “there is no indication [that] the trial court exercised its discretion to base [his] third strike sentences in counts 1 and 8 on any of the three punishments provided by statute.” In his supplemental brief, defendant asks that we remand the matter for resentencing pursuant to Senate Bill 1393. “Senate Bill 1393 amends sections 667[, subd. (a),] and 1385, subdivision (b) . . . , effective January 1, 2019, to give courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965 (*Garcia*).)

In *Keelen*, the Court of Appeal held that in calculating a third strike sentence under section 667, subdivision (e)(2)(A)(i), a trial court is not required to select the upper term as the term to be tripled, but may select the middle or lower term. (*Keelen*, *supra*, 62 Cal.App.4th at p. 820.) In that case, the trial court had failed to exercise its discretion because the Court of Appeal could not “say how the [trial] court would have exercised its sentencing discretion had it been aware such discretion existed nor [could it]

say selection of the middle term would have been an abuse of discretion as a matter of law.” (*Ibid.*)

After reviewing the reporter’s transcript of the sentencing hearing, we conclude that the matter must be remanded for resentencing. While we presume that the trial court correctly applied the law, there is no indication that the trial court exercised its discretion when it sentenced defendant to the upper terms on counts 1 and 8. A remand for resentencing is therefore required.

As for defendant’s request that we remand the matter for resentencing pursuant to Senate Bill 1393, we agree with the parties that the matter must be remanded to allow the trial court to exercise its newly-authorized discretion to strike the prior conviction enhancements imposed under section 667, subdivision (a)(1). (See *Garcia, supra*, 28 Cal.App.5th at p. 971.)

### **DISPOSITION**

The matter is remanded for resentencing (1) on counts 1 and 8 for the trial court to exercise its discretion, and (2) pursuant to section 667, subdivision (a), as amended by Senate Bill 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
CHAVEZ